

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 61168-2-I
)	
v.)	UNPUBLISHED OPINION
)	
KEVIN PEGUES,)	
)	
Appellant.)	FILED: <u>June 15, 2009</u>
_____)	

Schindler, C.J. — Kevin Pegues appeals his conviction for felony violation of a no contact order. He argues that the information failed to set forth an essential element of the offense and that the court abused its discretion in denying his request for an exceptional sentence below the standard range. We affirm.

DECISION

The facts are not disputed. The State charged Pegues with one count of felony violation of a court order. Following a bench trial, the court convicted him as charged. The court’s findings of fact included a finding that the victim “told the officers that the defendant got into her apartment by pushing open the window by the front door and reaching his arm in and unlocking the door.”

At sentencing, Pegues sought an exceptional sentence below the standard range based on his allegation that the victim was a willing participant in the

offense. The court concluded an exceptional sentence was not warranted and imposed a sentence within the standard range.

Pegues first contends the information failed to allege all the elements of felony violation of a no-contact order. He argues that the statute under which he was charged only criminalizes violations “for which an arrest is required under RCW 10.31.100(2) (a) or (b).” Former RCW 26.50.110(1) (1991). This language, he concludes, is an element of the offense that must be included in the information and proven at trial. Pegues concedes that we rejected this construction of RCW 26.50.110 in State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008), rev. granted, 165 Wn.2d 1003, 198 P.3d 512 (2008) but asks us to reconsider Bunker in light of two decisions from Division II: State v. Madrid, 145 Wn. App. 106, 192 P.3d 909 (2008) and State v. Hogan, 145 Wn. App. 210, 192 P.3d 915 (2008). We adhere to our decision in Bunker.

We also reject Pegues’ claim that the construction of the statute under Bunker violates the prohibition on ex post facto laws, i.e. laws that punish an act that was not punishable when committed.¹ He correctly notes that our construction of RCW 26.50.110 in Bunker rested in part on amendments enacted after the commission of his offenses. But we also held that even in the absence of the amendments, “traditional principles of statutory construction . . . demonstrate that the legislature always intended to criminalize violations of

¹ State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994) (citing U.S. Const. art. I, § 10; Wash. Const. art. I, § 23).

domestic violence no-contact orders.”² Thus, Bunker’s construction of RCW 26.50.010 does not render it an ex post facto law.

Pegues next contends the trial court abused its discretion in refusing his request for a sentence below the standard range. Under RCW 9.94A.535(1), a court may impose an exceptional sentence below the standard range if the court finds that mitigating circumstances are established by a preponderance of the evidence. Mitigating circumstances may be found if, “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94A.535(1)(a); Bunker, 144 Wn. App. at 421 (although consent is not a defense to felony violation of a no-contact order, a court may consider the victim’s willing participation as a basis for a sentence below the standard range).

Here, Pegues argued at sentencing that the victim invited him to her residence, and that her willing participation was a mitigating factor warranting a sentence below the standard range. In rejecting that argument, the court stated:

Assuming that the victim invited him over, that is not a substantial and compelling reason for a downward departure. That is probably the fact in 25 percent of these no-contact violations. But at the time of sentencing, I tell defendants, and I suspect most judges tell defendants that we don’t care; it’s not a defense that they invite you over. They can beg you to come over, on bended knee, and if you do, it’s a violation. We recognize the complexities of domestic violence relationships.

We recognize that frequently the victim requests the

² Bunker, 144 Wn. App. at 418.

presence of the defendant and, oftentimes, the victim is in here, asking that the no-contact order be dropped. And judges will say, no, we want the no-contact order. It's not just for your safety; it's for the safety of the officers who show up for a 911 call. So, the fact that he might have been invited over is not a defense.

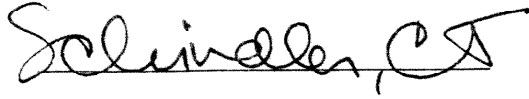
I do note that you don't have anything from the victim where she says I invited him over. She's not here, asking that the no-contact order be dropped, and everything is coming from the defense side of the case, which if she were truly interested in having him over there and truly interested in all this, I would suspect she would be in here saying, Judge, I invited him, it's my fault. But I don't see that, nor do I see that you even talked to her.

Pegues contends this ruling indicates that the court believed, erroneously, that it lacked authority to sentence him below the standard range based on the victim's willing participation. We disagree.

A plain reading of the oral decision demonstrates that the court considered the proposed mitigating factor and found it legally and factually insufficient to warrant an exceptional sentence. The court stated that even if the victim invited Pegues to her residence, that alone was "not a substantial and compelling reason for a downward departure." In support, the court observed that contact by the victim is relatively commonplace in no-contact order violations and thus does not warrant an exceptional sentence. In context, these statements demonstrate that the court recognized and exercised its discretion to impose an exceptional sentence based on willing participation.

The court's oral decision also indicates that Pegues failed to carry his burden of proving the mitigating facts by a preponderance of the evidence. Thus, even if the court misapprehended its authority to impose an exceptional

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sentence, the error would be harmless since there was no factual basis for such a sentence. We also conclude Pegues' statement of additional grounds for review presents no meritorious issues, and
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WE CONCUR:

